

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, ex rel. W.A.)
DREW EDMONDSON, in his capacity)
of ATTORNEY GENERAL OF THE)
STATE OF OKLAHOMA and)
OKLAHOMA SECRETARY OF THE)
ENVIRONMENT C. MILES TOLBERT,)
in his capacity as the TRUSTEE FOR)
NATURAL RESOURCES FOR THE)
STATE OF OKLAHOMA,)

Plaintiffs,)

vs.)

Case No. 05-CV-0329-TCK-SAJ

1. TYSON FOODS, INC.,)
2. TYSON POULTRY, INC.,)
3. TYSON CHICKEN, INC.,)
4. COBB-VANTRESS, INC.,)
5. AVAIGEN, INC.,)
6. CAL-MAINE FOODS, INC.,)
7. CAL-MAINE FARMS, INC.,)
8. CARGILL, INC.,)
9. CARGILL TURKEY)
PRODUCTION, LLC,)
10. GEORGE’S, INC.,)
11. GEORGE’S FARMS, INC.,)
12. PETERSON FARMS, INC.,)
13. SIMMONS FOODS, INC., and)
14. WILLOW BROOK FOODS, INC.,)

Defendants.)

**PETERSON FARMS, INC.’S OPPOSED MOTION FOR LEAVE
TO FILE SUR-REPLY ON ITS MOTION TO DISMISS**

Defendant Peterson Farms, Inc. (“Peterson”), pursuant to LCvR 7.1(h), hereby requests leave from the Court to file an over-sized Sur-Reply to the State of Oklahoma’s Supplemental Brief in Opposition to Peterson Farms, Inc.’s Motion to Dismiss and Alternative Motion to Stay the

Proceedings, a copy of which is attached hereto as Exhibit “A” along with its exhibits. Peterson has consulted the State regarding this Motion and the State opposes and objects to it.¹ In support of its Motion, Peterson states as follows:

1. The Northern District LCvR 7.1(h) provides that supplemental briefs may be filed only upon motion and leave of Court.

2. On December 16, 2005, over Peterson’s objection, the State sought and obtained leave to file a supplemental response brief to Peterson’s Motion to Dismiss and Alternative Motion to Stay the Proceedings (*See* Dkt. #162).

3. The State based its request for leave to file a supplemental brief on its desire to “clarify and correct the record” in the case “underscored by the complexity of the legal issues being placed before the Court for resolution and the overarching public import of the issues raised by this litigation.” (Dkt. #162 at 1).

4. In the interim, on May 2, 2006, the State of Arkansas, through its Attorney General and Natural Resources Commission, filed its Motion to Intervene into this lawsuit, contending that the State abandoned the collaborative process required by the Arkansas-Oklahoma Arkansas River Basin Compact in favor of unilateral actions—i.e., the instant lawsuit—taken in violation of the Compact. (*See* Dkt. ##499, 500).

¹ When asked for its consent to the Motion for Leave, the State’s counsel responded that it would consent provided that the Sur-Reply was restricted to new authorities issued since the State filed its Motion for Leave to File its Supplemental Brief, and provided that Peterson would consent in advance to the State filing a similarly restricted responsive brief. Peterson’s counsel discussed Peterson’s unwillingness to agree to the conditions imposed by the State with its counsel, and the State has advised that absent Peterson’s agreement to these conditions, it opposes the instant Motion.

5. On August 4, 2006, the State filed its Supplemental Brief in Opposition to Peterson Farms, Inc.’s Motion to Dismiss and Alternative Motion to Stay the Proceedings [hereinafter “Supplemental Brief”] (Dkt. #869).

6. In the Supplemental Brief, the State discounts and confuses Peterson’s arguments and positions taken with regard to the operation of the federal Clean Water Act and the Arkansas-Oklahoma Arkansas River Basin Compact on the State’s claims in this lawsuit, especially regarding the specific issues of preemption and primary jurisdiction. Indeed, in the Supplemental Brief, the State ridiculed Peterson’s position that the Compact requires collaboration between Oklahoma and Arkansas, stating that “[n]either the Compact nor common sense supports so bizarre a conclusion.” (Dkt. # 869 at 5).

7. Peterson submits that the State of Arkansas’s Motion to Intervene in this action and its reliance on the Arkansas-Oklahoma Arkansas River Basin Compact further supports its position that any action undertaken to address the interstate water quality issues raised in the State’s First Amended Complaint must be addressed through the collaborative process set forth in the Arkansas River Basin Compact as endorsed by the Clean Water Act.

8. Peterson filed its last brief on the underlying Motion to Dismiss on December 6, 2005. (Peterson’s Reply, Dkt. # 149). In the intervening eleven months that the Motion has been pending, additional persuasive opinions have been issued by other federal courts, Oklahoma legislation has been enacted, and the Oklahoma Department of Agriculture, Food and Forestry has issued its *Strategy for Restoration and Protection of Scenic River Watersheds Through Nutrient Management of Agricultural Activities* (Jan. 2006). The foregoing authorities and information are relevant to the Court’s determination of the preclusive effect of the federal Clean Water Act upon

the State's claims, as well as further supporting the conclusion that the primary jurisdiction over the State's claims lies within the state agencies and the Arkansas-Oklahoma Arkansas Basin Compact Commission who possess and are implementing statutorily-delegated regulatory authority over the conduct at issue pursuant to the mandate of the Clean Water Act. Peterson respectfully suggests that the Court should be informed of these developments in reaching its decision on the underlying Motion.

9. Through the Sur-Reply and the exhibits thereto, Peterson intends to advise the Court of developments over the last eleven months and correct the State's dismissive mischaracterizations of the comprehensive scheme set forth in the Clean Water Act and Arkansas-Oklahoma Arkansas River Basin Compact, which together control the intrastate and interstate water quality issues raised in the State's First Amended Complaint. Specifically, Peterson will demonstrate through narrative and graphical means how the Clean Water Act controls the State's claims, tracing the federal legislation from the Commerce Clause of the United States Constitution to the conduct at issue—the land application of poultry litter within the borders of Oklahoma and Arkansas.

10. As conceded by the State, these issues are complex and of utmost importance, having direct impact upon how the Court evaluates the viability of the State's claims in light of the comprehensive scheme set forth in the Clean Water Act and the vesting of jurisdiction in the Compact Commission by the congressionally-approved agreement entered into by the two states more than thirty years ago. Peterson respectfully suggests that the Court's consideration of these issues deserves the supplementation and clarifications contained in Peterson's proposed Sur-Reply. Moreover, Peterson maintains that, as the moving party, it is entitled to the last word on its Motion to Dismiss (Dkt. #75) and Alternative Motion for Stay (Dkt. #90).

WHEREFORE, Defendant Peterson Farms, Inc. prays that the Court grant it leave to file the attached Sur-Reply to the State of Oklahoma's Supplemental Brief in Opposition to Peterson Farms, Inc.'s Motion to Dismiss and Alternative Motion to Stay the Proceedings (Dkt. #869).

Respectfully submitted,

By /s/ A. Scott McDaniel

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CERTIFICATE OF SERVICE

I certify that on the 7th day of November, 2006, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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